

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

BERNARD WAITHAKA, on behalf of  
himself and all others similarly situated,

Plaintiff,

v.

AMAZON.COM INC. and  
AMAZON LOGISTICS, INC.,

Defendants.

Case No. 2:19-cv-01320-JCC

**PLAINTIFF'S MOTION TO CERTIFY  
STATE LAW QUESTION TO THE  
MASSACHUSETTS SUPREME  
JUDICIAL COURT OR TO CERTIFY  
ORDER FOR INTERLOCUTORY  
APPEAL UNDER 28 U.S.C. § 1292(b)**

**NOTE DATE: January 31, 2025**

PL.'S. MOT. TO CERTIFY STATE LAW QUESTION  
OR TO CERTIFY ORDER UNDER 28 U.S.C. § 1292  
Case No. 2:19-cv-01320-JCC

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I. INTRODUCTION

In its order denying class certification, the Court *sua sponte* dismissed Plaintiff Bernard Waithaka's claim for unpaid business expenses under the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148.<sup>1</sup> (Dkt. No. 186 at 10–11). Despite recognizing that the Wage Act prohibits “special contracts” that reduce wages earned by an employee, the Court interpreted the Act as allowing Amazon to reduce Plaintiff's wages by refusing to compensate him for “generic business expenses” he is required to incur in order to do his work. (*Id.* at 9–10). Because Massachusetts law is unclear on this issue, as recognized by the Court in its ruling, and because Massachusetts' highest court has not directly addressed this issue, the Court's decision on this point warrants appellate review. Notably, as Amazon itself pointed out (Dkt. No. 184 at 7), this very point was previously certified to the Massachusetts Supreme Judicial Court (“SJC”) but then ultimately was not decided.<sup>2</sup>

Thus, Plaintiff respectfully requests that the Court certify to the Massachusetts Supreme Judicial Court the question of whether the Massachusetts Wage Act requires an employer to compensate employees for business expenses required in order for a worker to perform their job. *See* Mass. S.J.C. Rule 1:03 (“This court may answer questions of law certified to it by . . . a United States District Court”). Alternatively, the Court should certify its order under 28 U.S.C.

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<sup>1</sup> Alleged in Count II of Plaintiff's Complaint. (Dkt. No. 1-1 at 9)

<sup>2</sup> *See Schwann v. FedEx Ground Package Sys., Inc.*, 2014 WL 496882, at \*3 (D. Mass. 2014).

§ 1292(b) so that the Ninth Circuit can review this controlling question of state law and decide whether to certify it to Massachusetts' high court.<sup>3</sup>

## II. BACKGROUND

Plaintiff is a delivery driver for Defendants' Amazon Flex program. (Dkt. No. 172-1 at 1). Plaintiff contends that Amazon misclassifies him and other Massachusetts-based delivery drivers as independent contractors, even though they are Amazon's employees under state law. (See Dkt. No. 1-1 at 1). This misclassification allows Amazon to unlawfully shift ordinary business costs—such as vehicle expenses, phone plans, and insurance premiums—onto its delivery drivers. (*Id.* at 4–5).

Plaintiff's complaint asserts three putative class claims under state law. (*Id.* at 4–5). Count I alleges that Amazon violated the Massachusetts Independent Contractor Law, Mass. Gen. Laws ch. 149, § 148B, by misclassifying its delivery drivers in Massachusetts as independent contractors. (*Id.* at 4). Count II alleges that Amazon violated the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148, by forcing delivery drivers to incur business expenses necessary to perform their work. (*Id.* at 5). Count III alleges that Amazon violated the Massachusetts Minimum Wage Law, Mass. Gen. Laws ch. 151, §§ 1, 7, by failing to pay delivery drivers the state minimum wage.

Plaintiff first moved for class certification in May 2021 (Dkt. No. 97), but this case was stayed pending various appeals. (Dkt. Nos. 91 at 16, 153 at 3). The Court lifted the stay last

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<sup>3</sup> Plaintiff also intends to file a separate petition for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f).

1 year (Dkt. No. 166 at 1), and Plaintiff again moved for class certification under Federal Rule of  
 2 Civil Procedure 23. (Dkt. No. 172 at 9). Defendants opposed certification, arguing that there is  
 3 insufficient commonality between class members and that individual issues will predominate  
 4 over common ones. (Dkt. No. 178 at 17–35).

5 Before deciding Plaintiff’s renewed motion for class certification, the Court requested  
 6 supplemental briefing “as to why the Massachusetts Wage Act, Mass. Gen. Laws ch. 149, § 148  
 7 (2009), requires employers to pay employee business expenses, rather than forbids the unlawful  
 8 wage deductions[.]” (Dkt. No. 182). In response, Amazon claimed that “no on-point cases”  
 9 support Plaintiff’s assertion that employers must reimburse employees’ business expenses under  
 10 the Massachusetts Wage Act, Mass. Gen. Laws Ann. ch. 149, § 148. (Dkt. No. 184 at 1). By  
 11 contrast, Plaintiff’s supplemental brief cited opinions in which the Massachusetts Supreme  
 12 Judicial Court (SJC) held that employer policies shifting “the ordinary costs of doing business”  
 13 onto employees violate the Wage Act. (Dkt. No. 183) (citing, among other cases, *Camara v.*  
 14 *Att’y Gen.*, 941 N.E.2d 1118, 1123 n.11 (Mass. 2011), and *Awuah v. Coverall N. Am., Inc.*, 952  
 15 N.E.2d 890, 893 (Mass. 2011)).<sup>4</sup>

16 After receiving the parties’ supplemental briefs (Dkt Nos. 183–85), this Court denied  
 17 Plaintiff’s renewed motion for class certification. (Dkt. 186). Besides denying class  
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21 <sup>4</sup> See also *DaSilva v. Border Transfer of MA, Inc.*, 377 F. Supp. 3d 74, 89 (D. Mass. 2019)  
 22 (rejecting argument that plaintiffs cannot recover expenses because they were paid out of  
 23 pocket, and not as deductions); *Furtado v. Republic Parking Sys., LLC*, 2020 WL 996849, at \*4  
 24 (D. Mass. Mar. 2, 2020) (holding that an employer’s failure to reimburse the plaintiff for travel  
 25 expenses violated the Wage Act because the statute bars reducing wages by any means);  
 26 *Serebrennikov v. Proxet Grp. LLC*, 2024 WL 1375971, at \*5 (D. Mass. Mar. 29, 2024) (same  
 but with no “contractual commitment to reimburse” business expenses).

certification, the Court *sua sponte* dismissed Plaintiff's claim for unpaid business expenses under the Wage Act. (*Id. at 186* at 10–11). Despite acknowledging that “the Wage Act protects against . . . shifting some employer costs against public policy (like workers’ compensation insurance),” this Court held that “it is not a violation of the Wage Act for an employer to refuse compensation for generic business expenses like those alleged here.” (*Id. at 10*). The Court also noted that “there is no authority” on whether “business expenses constitute wages.” (*Id. at 8–9*).

Because Massachusetts law is unclear on this issue, and it is a significant issue under state law that has not yet been addressed by Massachusetts’ highest court, the Court should give the opportunity for the Massachusetts Supreme Judicial Court (“SJC”) to decide this issue – either by certifying the issue directly to that Court, or certifying an immediate appeal under 28 U.S.C. § 1292(b), thus giving the Ninth Circuit the opportunity to address it or certify it to the Massachusetts Supreme Judicial Court.

### III. ARGUMENT

#### A. The Court should certify to the SJC the question of whether the Wage Act requires an employer to compensate employees for business expenses incurred under an unlawful independent contractor agreement.

The SJC has the authority to “answer questions of law certified to it by . . . a Court of Appeals of the United States . . . or a United States District Court” if the question regards Massachusetts law and “may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.” Mass. S.J.C. Rule 1:03. This authority to answer certified questions “may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.” *Id.*

1 “The decision whether to certify a question to [a state supreme court] rests in the  
 2 discretion of the federal court.” *Sharawe v. Indian Harbor Ins. Co.*, 614 F. Supp. 3d 892, 895  
 3 (W.D. Wash. 2022) (citing *Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019); *see*  
 4 *also Davalos v. Baywatch Inc.*, 707 F. Supp. 3d 26, 28 (D. Mass. 2023) (certifying question to  
 5 SJC). In deciding whether to exercise such discretion, courts in the Ninth Circuit consider:

- 6 (1) whether the question presents important public policy  
 7 ramifications yet unresolved by the state court;
- 8 (2) whether the issue is new, substantial, and of broad  
 9 application;
- 10 (3) the state court’s caseload; and
- 11 (4) the spirit of comity and federalism.

12 *Murray*, 924 F.3d at 1072 (internal quotation marks and citation omitted). Each factor supports  
 13 certification here.

14 The SJC has not directly addressed whether the Massachusetts Wage Act requires an  
 15 employer to compensate employees for business expenses they must incur in order to perform  
 16 their work. That said, the SJC has decided that an employee misclassified as an independent  
 17 contractor could recover franchise fees and workers’ compensation insurance premiums “as  
 18 ‘damages incurred’ under the enforcement section of the Wage Act.” *Awuah*, 952 N.E.2d at  
 19 893, 899. Plaintiff believes that the thrust of that decision recognized that requiring  
 20 (misclassified) employees to bear out-of-pocket expenses in order to perform their jobs  
 21 constitute unlawful wage deductions, just the same as if the employer took them directly out of  
 22 their paycheck (as the District of Massachusetts recognized, *e.g.*, *DaSilva*, 377 F. Supp. 3d at  
 23 89), Plaintiff recognizes from the Court’s decision that that issue has not been made entirely  
 24  
 25

1 clear by Massachusetts' highest court. As this is a critical (and recurring) issue, that court, the  
 2 SJC, should have the opportunity to decide this extremely important state law question. That  
 3 Court should be asked whether its reasoning in *Awuah* was limited to franchise fees and  
 4 workers' compensation insurance premiums, as this Court believes, or applies to any business  
 5 expense required for an employee to perform their work, as Plaintiff asserts. A decision on this  
 6 substantial issue would have significant public policy ramifications, whatever the outcome.  
 7 Thus, the first two *Murray* factors favor certification.

8  
 9 The third *Murray* factor—the state court's caseload—is immaterial because the SJC's  
 10 authority to answer certified questions is discretionary. *See* Mass. S.J.C. Rule 1:03. If the SJC  
 11 believes it is too busy to resolve this critical question of state law, it can simply decline to  
 12 answer. And, regardless, the SJC's case statistics suggest that its caseload rarely fluctuates.  
 13 *See, e.g.*, SJC Case Statistics FY 2022–FY 2023, [https://www.mass.gov/info-details/supreme-](https://www.mass.gov/info-details/supreme-judicial-court-case-statistics)  
 14 [judicial-court-case-statistics](https://www.mass.gov/info-details/supreme-judicial-court-case-statistics).

15  
 16 The last *Murray* factor also favors certification. Consistent with principles of comity,  
 17 this Court “attempted to approximate state law as closely as possible in order to make sure that  
 18 the vindication of the state right is without discrimination because of the federal forum.” *Gee v.*  
 19 *Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir.1980). But rather than settle for an approximation,  
 20 this Court should allow the SJC to resolve this significant question of Massachusetts law.

21  
 22 In fact, as noted above, a federal district court previously certified this same question to  
 23 the SJC, recognizing that “the question of whether business expenses and deductions borne by  
 24 employees are recoverable under the Wage Act is unsettled under state law.” *Schwann v. FedEx*  
 25 *Ground Package Sys., Inc.*, 2014 WL 496882, at \*3 (D. Mass. Feb. 7, 2014). Not only did the

1 SJC accept this question, it solicited amicus briefs on the issue. *See Schwann, et al., v. FedEx*  
 2 *Ground Package Sys., Inc.*, No. JSC-11653.<sup>5</sup> Alas, the SJC never answered the certified  
 3 question because of procedural developments in the *Schwann* case. *Id.*

4 This case presents the perfect opportunity for the SJC to finally address whether the  
 5 Wage Act requires an employer to compensate employees for business expenses incurred in  
 6 order for an employee to perform their job. This Court should thus certify this question to the  
 7 SJC under Mass. S.J.C. Rule 1:03.

8  
 9 **B. In the alternative, the Court should instead certify its order for interlocutory  
 review, allowing the Ninth Circuit to determine how to proceed**

10 Under Section 1292(b), a district court may certify a non-final order for interlocutory  
 11 appeal if the order:

- 12 (1) “involves a controlling question of law”;  
 13 (2) “as to which there is substantial ground for difference of  
 14 opinion”; and  
 15 (3) “an immediate appeal from the order may materially  
 16 advance the ultimate termination of the litigation[.]”

17 28 U.S.C. § 1292(b). All three factors support interlocutory review here.

18 Whether the Wage Act requires an employer to compensate employees for business  
 19 expenses incurred in performing their job is a controlling question of law. After answering this  
 20 question in the negative, the Court *sua sponte* dismissed Plaintiff’s claim for business expenses  
 21 under the Wage Act. (Dkt. No. 186 at 10). The Court then denied Plaintiff’s class certification  
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23 \_\_\_\_\_  
 24 <sup>5</sup> A copy of the certification order, SJC docket, and appellant’s briefs are attached as  
 25 Exhibits 1–4.



1 motion, reasoning that Plaintiff's other claim for failure to pay minimum wages would require  
2 too many individual inquiries into how each delivery driver spent his or her time.<sup>6</sup>

3 There is also substantial ground for differing opinions on the Wage Act question. As the  
4 Ninth Circuit has repeatedly noted, "a substantial ground for difference of opinion exists where  
5 novel and difficult questions of first impression are presented," as is the case here. *Reese v. BP*  
6 *Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (cleaned up). "[F]air-minded jurists"  
7 could reach "contradictory conclusions" about whether the Wage Act allows employers to shift  
8 ordinary business expenses onto employees by misclassifying them as independent contractors.<sup>7</sup>  
9 *Id.* Indeed, that is why the SJC solicited amicus briefs on this very issue. *See* Exhibit 1.

11 An immediate appeal on this issue would also materially advance the ultimate  
12 termination of the litigation. For certification, interlocutory appeal need not "have a final,  
13 dispositive effect on the litigation." *Reese*, 643 F.3d at 688. Rather, appellate review need only  
14 "materially advance the litigation," as would be the case here. *Id.* Reversal on appeal would  
15 restore Plaintiff's business expense claims and, potentially, his putative class claims. "That is  
16 sufficient to advance materially the litigation[.]" *Id.*

18  
19 <sup>6</sup> Clearly, if business expenses are recoverable under the Massachusetts Wage Act, that  
20 issue will be a common issue that should be certified on a classwide basis, since every Amazon  
21 Flex driver is required to incur business expenses in order to do their work but are not  
reimbursed for those expenses by Amazon.

22 <sup>7</sup> In fact, this Court reached the opposition conclusion when it construed a similar statute  
23 in *Kalmanovitz v. Standen*, 2015 WL 9273611, at \*5 (W.D. Wash. Dec. 21, 2015) ("Having  
24 reviewed the relevant case law, the intent of the legislature, and the facts of this case, the Court  
25 finds that allowable business expenses are to be paid 'by reason of employment' and are  
therefore 'wages' for purposes of the WRA."). The opinions cited in footnote four also conflict  
with this Court's decision.

1 **IV. CONCLUSION**

2 The SJC has previously had the important question of law presented here certified to it,  
 3 and it agreed to decide this issue. However, since the SJC did not have the opportunity  
 4 previously to decide the issue, this case now raises another opportunity for it to do so. The  
 5 Court should thus certify to the SJC the question of whether the Massachusetts Wage Act  
 6 requires an employer to reimburse employees for necessary business expenses incurred in order  
 7 to perform their jobs. Alternatively, the Court should certify its order denying class certification  
 8 and dismissing the Massachusetts Wage Act claim for interlocutory review, allowing the Ninth  
 9 Circuit to review this issue and determine how to proceed.  
 10

11 Dated: January 10, 2024

*I certify that this opposition brief less than 4,200 words in compliance with the Local Civil Rules.*

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